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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER, 1973

NO. 73-413

JOHN PAUL SHELTON
Petitioner
VS.
UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI

PIERRE HOWARD, SR.
WILLIAM V. HALL, JR.

HOWARD, HOWARD AND HALL
600 First National Bank Bldg.
Decatur, Georgia 30030
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN PAUL SHELTON, PETITIONER	
VERSUS	CASE NO.
UNITED STATES OF AMERICA, RESPONDENT	

PETITION FOR WRIT OF CERTIORARI

John Paul Shelton, Petitioner, prays for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, to review an Order of that Court dated August 2, 1973, conditionally revoking petitioner's appeal bond in the above-styled case, and conditionally dismissing his appeal.

OPINIONS BELOW

The opinion of the Court of Appeals has not been officially reported. It is dated August 2, 1973, Case No. 73-1776 in the Court of Appeals. The judgment and sentence of the United States District Court for the Northern District of Georgia is not officially reported and no opinion was written. The District Court judgment is dated February 2, 1973, Case No. 27314 in that Court.

JURISDICTIONAL GROUNDS

(1) The date of the judgment and opinion of the Court of Appeals, and date same was entered, is August 2, 1973.

(2) No orders have been entered respecting a rehearing or extension of time.

(3) On August 15, 1973, the Court of Appeals entered an Order denying petitioner's motion for stay of mandate pending petition for writ of certiorari.

(4) The statutory provision conferring on this Court jurisdiction to review the judgment in question by writ of certiorari is *28 USC § 1254(1)*.

QUESTIONS PRESENTED FOR REVIEW

The court below ordered petitioner's criminal appeal bond conditionally revoked, and his appeal conditionally dismissed, solely upon unsworn allegations of Government counsel that petitioner, pending appeal, had become a fugitive in an unrelated state case. The Government's motions to revoke appeal bond, and to dismiss appeal, were not supported by affidavit, transcript, court record, or other document, certified or otherwise.

Petitioner's counsel filed a response to the motion to dismiss, alleging that petitioner had not violated the terms of his appeal bond, and that there was no evidence that he was, or is, a fugitive.

Petitioner had notice of the Government's motion to dismiss appeal, but did not have notice that the motion to revoke bail was to be presented to the Court for a ruling. Hence his response was addressed solely to the motion to dismiss appeal.

The questions presented for review are:

1.

Whether, upon the Government's application to revoke bail, the burden is on the Government to make a proper showing that it should be revoked, or on the accused to show why it should not be revoked.

2.

Whether, assuming the burden is on the Government, such burden was met by unverified allegations of Government counsel that petitioner had become a

fugitive on an unrelated state charge, where no affidavit, court record, transcript, or other document, certified or otherwise, was submitted to the Court in support of the allegation of fugitivity, and where petitioner did not admit the Government's allegations, but affirmatively averred that he had not violated the terms of his bond, and that there was no evidence that he was, or is, a fugitive.

3.

Whether the Court of Appeals could properly rule on the Government's motion to revoke bond, without first giving notice to petitioner that the motion was under consideration and would be ruled upon without oral argument.

4.

Whether the lower court, in remanding the cause to the District Court for further proceedings, should have decreed that the burden would be on the Government upon remand, instead of decreeing, as it did, that the burden would be on petitioner to "show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final".

5.

Whether, even if the Government's unverified allegations of fugitivity on an unrelated state charge were true, such alleged fugitivity would be ground for revoking the federal bond and/or dismissing the federal appeal, where no showing is made that the terms of the federal bond were breeched, or that petitioner had left the jurisdiction of the Fifth Circuit Court of Appeals.

6.

Whether the lower court had authority or jurisdiction to conditionally dismiss the appeal on the sole basis of unsworn allegations of Government counsel, unsupported by any record, that petitioner was a fugitive on an unrelated state charge.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

1. The due process of law clause, and equal protection clause, of the Fifth Amendment.

2. Local Rule 6 of the United States Court of Appeals for the Fifth Circuit: "PRACTICE. Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court."

STATEMENT OF THE CASE

Petitioner was convicted by a jury in the United States District Court for the Northern District of Georgia for violation of the National Motor Vehicle Theft Act, and was sentenced to serve two concurrent terms of five years on February 2, 1973. Notice of appeal was filed March 5, 1973. The District Court granted Shelton release pending appeal on condition of $5,000.00 bond with surety. The appeal bond was executed April 6, 1973, by Shelton as principal, and by Wanda M. Clemons for Dependable Insurance Company as surety.

The appeal bond recites, in pertinent part:

"NOW, the condition of the above obligation is such, that if the said John Paul Shelton shall appear in the United States Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held in the city of New Orleans, Louisiana, or Atlanta, Georgia, and from day to day and from term to term thereafter until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue, and effect."

The record on appeal was timely prepared, but by stipulation of the parties was retained in the District Court, where it remains at the present time, for

use of the parties in preparing briefs, pursuant to *Rule 11(c), Federal Rules of Appellate Procedure.* The case was timely docketed in the Court of Appeals, but the only record that was ever transmitted to that Court was a statement of docket entries.

Petitioner's brief on appeal was filed June 1, 1973. No brief on the merits has been filed by the Government.

On or about June 15, 1973, the Government filed in the Court of Appeals a "Motion to Dismiss Appeal". The alleged "facts" relied on by the Government for dismissing the appeal were not, and are not, contained in, or supported by, any transcript, record, document, paper, or other thing, but consist of the following naked, unsworn recitals by Government counsel in the body of the motion:

"On Tuesday, May 29, 1973, trial was commenced in Fulton Superior Court, Atlanta Judicial Circuit, in the case of the *State v. Paul Shelton*, Indictment No. A16925 (forgery) and on June 1, 1973, while the jury was deliberating his case, SHELTON escaped from the Fulton County Courthouse. A guilty verdict was returned, and SHELTON received a forty year sentence from the Honorable John Langford, Judge, Fulton Superior Court. SHELTON'S bond in connection with his state case was forfeited and a bench warrant was issued on that date. SHELTON is currently a fugitive from justice from the State of Georgia.

"In view of the above, the United States of America believes that the appellant has violated the terms of his appeal bond and has left the jurisdiction

of the Northern District of Georgia. The United States has this date filed a motion to revoke the appeal bond of appellant with the United States District Court for the Northern District of Georgia in criminal case number 27,314.

"WHEREFORE, it is respectfully requested that the appeal in this case be dismissed without prejudice to the appellant's right to re-open his appeal at some subsequent date".

The Government has never filed, in support of its motion to dismiss appeal, any affidavit, or any record, pleading, order, or other document from any state court or any federal court, with exception of an uncertified copy of the appeal bond, which Shelton executed in the instant case.

On June 18, 1973, the Clerk of the Court of Appeals mailed to Shelton a notice stating that the Government's motion to dismiss appeal had been received and filed, and would be presented to the Court for a ruling, together with any response filed by Shelton, on June 25, 1973.

Upon receipt of the above-mentioned notice, Shelton (who up to this time was representing himself on appeal) retained the undersigned counsel, who immediately sought, and obtained, an extension of time, to and including July 3, 1973, to file a response to the Government's motion to dismiss appeal.

While the motion to dismiss appeal was pending, the Government, on or about June 19, 1973, filed in the Court of Appeals a "Motion for Revocation and/or

Forfeiture of Appeal Bond", and served a copy of the motion on petitioner, by mail. The Court of Appeals, however, has never notified petitioner of the filing of the motion, or advised petitioner that the motion would be presented to the Court for a ruling on any particular date, or at any time whatsoever.

The Government's motion to revoke or forfeit appeal bond contains the following unsworn allegations by Government counsel, which are not supported by any transcript, record, paper, or other thing:

> "2. The Government also filed with the United States District Court for the Northern District of Georgia, a motion for forfeiture of the appeal bond on June 15, 1973, and a show cause order was issued that date directing SHELTON and his attorneys of record, Wesley R. Asinof and Charles R. Smith, to show cause on June 18, 1973, at 10:00 a.m., why the motion to revoke appeal bond should not be granted, by either producing SHELTON in Court or providing a satisfactory explanation that he has not violated the terms of his appeal bond. Messrs. Asinof and Smith advised the United States Attorney's Office that they did not wish to appear at this hearing since neither currently represents SHELTON on appeal, and neither has any information regarding his present whereabouts. It should be noted that Mr. Smith represented SHELTON in *State vs. John Paul Shelton*, Indictment No. A-16925 (forgery) in Fulton Superior Court, Atlanta Judicial Circuit, wherein SHELTON escaped from the Fulton County Courthouse while the jury was deliberating his case.

"3. SHELTON failed to make an appearance on June 18, 1973, but there was an appearance on behalf of Wanda M. Clemons for Dependable Insurance Company, Atlanta, Georgia, and the Honorable Charles A. Moye, Jr., United States District Judge, after considering the Government's motion for forfeiture of appeal bond, determined that according to the wording of the bond, this motion was more properly addressed to the Fifth Circuit Court of Appeals, and he lacked the jurisdiction to grant the relief requested by the Government. A copy of said appeal bond is attached hereto marked Exhibit "A" and made a part hereof.

"4. The Government is informed that SHELTON remains a fugitive from justice from the State of Georgia.

"WHEREFORE, the United States of America moves that SHELTON'S appeal bond in the sum of $5,000.00 be revoked and forfeited, and that this Court direct that a bench warrant issue for SHELTON'S arrest instanter on the grounds that it appears that SHELTON has absconded the jurisdiction of this Court and is in contempt of the authority of this Court, as well as the Fulton County Superior Court."

Counsel for petitioner then filed on or about July 3, 1973, a response in opposition to the motion to dismiss which averred that petitioner had not violated any of the terms of the appeal bond set in that case, that he had appeared promptly in the court below for arraignment, motions, trial and sentence, that he had diligently prosecuted his appeal, filed the nec-

essary briefs and denied that he had in any wise violated the terms of his appeal bond.

It does not appear that a copy of the motion to forfeit or revoke appeal bond was served on the surety, Wanda Clemons.

On August 2, 1973, the Court of Appeals handed down the Order which petitioner is now seeking to have reviewed on certiorari. Said Order conditionally revokes the appeal bond, and conditionally dismisses the appeal. The Court of Appeals further ordered that the cause be "remanded to the District Court which shall schedule a prompt hearing at which appellant shall appear in person (and with counsel, if he wishes) and show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final".

Petitioner on or about August 8, 1973 filed in the Court of Appeals a motion for stay of mandate pending application to this Court for writ of certiorari. On August 15, 1973, the Court of Appeals denied the motion for stay of mandate.

The jurisdiction of the Court of Appeals is based on 28 USC §3231.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

The decision below is in conflict with the established rule that prevails in the United States Courts of Appeals for the Fourth Circuit, Ninth Circuit, and District of Columbia Circuit. This rule is: That once bail has been granted, and the Government seeks to have it revoked or modified, the burden of proof is on the Government to show by competent evidence why it should be revoked or modified, and not on a defendant to show cause why it should *not* be revoked or modified. In the instant case the Court of Appeals erroneously accepted as true the naked assertions of Government counsel that petitioner was a fugitive on an unrelated state charge, although said assertions were not sworn to or otherwise supported by any affidavit or document. Although the revocation of bond was "conditional", the Court below decreed that upon remand to the District Court for further proceedings, the burden would be on *petitioner* to show cause why the conditional order of the Court of Appeals should not be made final. The decision below, insofar as it shifts the burden of proof to petitioner, is in conflict with the following decisions of other Circuits:

(a) In *Christoffel v. United States* 196 F 2d 560, at page 566, (Dist. of Col. 1951) the Court, in denying the Government's motion to revoke or modify a criminal appeal bond, held:

> "8. The Courts have, of course, power to revoke an order admitting to bail . . . . But neither revocation of an order admitting to bail nor modi-

fication of the terms thereof is to be arbitrarily done. *Proper showing* of a reason for revocation or modification must be made." (Emphasis by brief writer).

(b) In *Rhodes v. United States* 275 F 2d 78, 80, (4 Cir. 1960) the Court held that the burden of proof is on the Government where it opposes applications for bail (citing Justice Frankfurter's Memorandum Opinion in *Ward v. United States*, 76 S Ct 1063, 1065, 1 L Ed 2d 25).

(c) In *Bridges v. United States* 184 F 2d 881, (9 Cir. 1950) the Court of Appeals, setting aside an order revoking bail, held that the burden was on the Government to show cause for revoking bail, and that the Government had not met its burden.

(d) In *Drew v. United States* 384 F 2d 314, 315, (Dist. of Col. 1967) the Court followed its own decision in *Christoffel v. United States, supra*, and held that before an order admitting to bail can be revoked or modified, a "proper showing of a reason for revocation or modification must be made".

2.

The Court below, in conditionally revoking appeal bond and conditionally dismissing appeal on basis of unsworn allegations of Government counsel which were not admitted by petitioner, and decreeing that upon remand to the District Court the burden would be on petitioner to show cause why the order of the Court of Appeals should not be made final, has abridged the due process clause of the Fifth Amendment, and has so far departed from the usual practice and course of judicial proceedings in bail revocation

cases as to call for the exercise of this Court's supervisory power.

3.

The decision below is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Lannom v. United States* (CA Cal. 1968) 401 F 2d 504, where the Court denied the Government's motion to dismiss an appeal from conviction as moot on ground that defendant had jumped bail and was a fugitive.

ARGUMENT

Petitioner has been unable to find any case where a Court of Appeals revoked an appeal bond, or dismissed an appeal, either conditionally or finally, in a case where the fugitivity complained of involved another court, in a state jurisdiction, in an unrelated case, and where the only showing of fugitivity was the naked assertion of Government counsel, unsupported by any affidavit or court record or other document whatsoever.

The court below cited in its opinion and erroneously relied upon the following cases, all of which are distinguishable in that they involved situations where the defendants had absconded or jumped bail or escaped in the very case under appeal, and the fact of their fugitivity was conceded by their counsel:

In *Molinaro v. New Jersey*, 396 U.S. 692, 24 L Ed 2d 586, this Court dismissed an appeal from a state court, upon an uncontroverted showing that the state court had revoked Molinaro's bond in the very case under consideration, and upon admission by defense counsel that Molinaro was indeed a fugitive.

In *Eisler v. United States*, 338 U.S. 189, 93 L Ed 1897, dismissed 338 US 883, 94 L Ed 542 (1949), this Court dismissed a petition for certiorari upon an uncontroverted showing that Eisler had fled to Great Britain, and efforts to extradite him had been unsuccessful. Eisler was a fugitive on the very charge under appeal.

In *Smith v. United States*, 94 US 97, 24 L Ed 32

(1876), this Court dismissed a writ of error where it was "admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail."

In *Johnson v. Laird*, 432 F 2d 77 (CA 9, 1970), an Army serviceman was seeking release by habeas corpus from the Army as a conscientious objector. The District Court denied relief and Johnson appealed. Upon oral argument of the appeal, the Court was informed without contradiction that Johnson had deserted from the Army, and was out of the country.

In *United States v. O'Neal*, 453 F 2d 344 (CA 10, 1972), the record showed, at time of oral argument of the appeal, that the District Court had forfeited O'Neal's appeal bond and issued a bench warrant. The record showed that O'Neal was a fugitive on the very case under appeal. The Court in conditionally dismissing the appeal stated: "At argument on the motion to dismiss there was no dispute asserted by appellant's counsel as to these record facts."

In *United States v. Dawson*, 350 F 2d 396 (CA 6, 1965) the defendant fled the jurisdiction of the District Court, and the District Court forfeited the bond. As of date of oral argument, Dawson had not been apprehended. He was a fugitive, with bond forfeited, on the very charge under appeal.

The unreliability of the unsworn allegations of Government counsel with respect to petitioner's alleged fugitivity is apparent from the contradiction contained therein. Government counsel alleges first

that petitioner "escaped" from custody, then alleges that his bond was forfeited. These allegations are incompatible, as a defendant would not be on bond if he was in custody, and vice versa. A defendant could escape from custody, or jump bail while on bond, but Government counsel has not explained how he could do both simultaneously on the same charge.

With respect to the Government's motion to revoke appeal bond, petitioner had no notice that the motion was to be ruled upon without oral argument, or that it was to be considered by the Court at all. It is the practice of the Court of Appeals to notify a party when a motion of substance has been made, so that he may respond and oppose the motion. Such notice was given to petitioner with respect to the motion to dismiss appeal, but not with respect to the motion to revoke bond. While there appears to be no rule of court or statute specifically requiring notice in the case of motions in the courts of appeals, the Fifth Circuit has Local Rule 6, which provides:

> "Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court."

As evidenced by the notice of motion given to petitioner in connection with the motion to dismiss appeal (which was filed prior to filing of the motion to revoke appeal bond), it is the practice of the Court of Appeals to serve notice of a motion on a party, where his substantial rights are affected. The petitioner did not respond to the motion to revoke bond because he had no notice it was to be ruled upon. Petitioner's rights to due process of law under the Fifth Amendment, and Local

Rule 6 of the Fifth Circuit, were abridged when the Court ruled on the motion to revoke bond without prior notice to petitioner.

When additional bail is sought by the Government in a criminal case, 18 USC 3143 requires that "proof" shall be made to the judge that the defendant is about to abscond. This statute would seem to require, also, that when the Government seeks to have a bond revoked, the Court should require "proof" of circumstances justifying revocation. And it is clear that due process requires as "proof" something more than naked assertions of Government counsel, unsupported by affidavit or by any other document or record.

CONCLUSION

For the foregoing reasons it is submitted that the writ of certiorari should issue.

Respectfullly submitted

PIERRE HOWARD, SR.
WILLIAM V. HALL, JR.
HOWARD, HOWARD AND HALL
600 First National Bank Bldg.
Decatur, Georgia

CERTIFICATE OF SERVICE

I have served copies of the foregoing Petition for Writ of Certiorari upon John W. Stokes, Jr. and Eugene A. Medori, United States Attorneys by personal delivery thereof at their office at the Old Post Office Building, Atlanta, Georgia.

This Sept. 4, 1973.

WILLIAM V. HALL, JR.
HOWARD, HOWARD & HALL
600 First National Bank Bldg.
Decatur, Georgia

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No. 73-413

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN PAUL SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-413

JOHN PAUL SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's appeal from a federal conviction was conditionally dismissed by the court of appeals, and his appeal bond conditionally revoked, pursuant to government counsel's representation that he had jumped bail and become a fugitive while contemporaneously undergoing trial on unrelated state charges. Petitioner challenges the conditional orders on the grounds that he is a fugitive only from his state prosecution and that the government's supporting allegations (which he has not denied) were not sworn to. The revocation order is challenged on the additional ground that petitioner allegedly was not avised that the request therefor was under consideration.

525-282—73——1

On June 18, 1973 (the same day as the district court hearing), the clerk of the court of appeals mailed petitioner a notice advising him of the filing of the motion to dismiss the appeal and stating that the motion would be presented to the court for disposition, together with any response petitioner might file, on June 25 (R. 6; Pet. 9). Upon receipt of the notice, petitioner, who had been proceeding *pro se* on his appeal, retained his present counsel (an attorney who had not represented him either in the state or federal trial proceedings), and at the attorney's request petitioner's time for responding to the motion was extended to July 3, 1973 (R. 6–7; Pet. 9). On June 19, 1973, pursuant to the district court's ruling that the motion to forfeit the appeal bond should more appropriately be addressed to the court of appeals, the government filed such a motion in that court (R. 6–8; Pet. 9–10). Copies of the motion, in which the proceedings to date were summarized, were served by mail by government counsel on petitioner's new counsel as well as on petitioner (R. 8).

On July 3, 1973, petitioner, through his counsel, filed in the court of appeals a response to the motion to dismiss (R. 13–14). Petitioner denied in the pleading that he had violated any of the terms of his appeal bond and said there was "no evidence that" he was or had been a fugitive, or that he would fail to abide by the court's judgment, whatever it might be (*ibid.*). He did not, however, deny the government's specific factual allegations relating to his escape from the Fulton County Courthouse while on state

trial for forgery, the ensuing forfeiture of his state bail bond, and the issuance of a bench warrant for his arrest. Nor did he question the sufficiency of the allegations as a basis for granting the relief requested, on the ground that they had not been verified by affidavit. No independent response to the forfeiture motion was filed.

On August 2, 1973, the court of appeals, in the judgment here challenged, conditionally revoked petitioner's appeal bond, conditionally dismissed the appeal, and remanded the cause to the district court for a hearing at which petitioner was directed to appear in person (accompanied by counsel if he wished) and show cause why the conditional orders should not be made final. The court directed that copies of its judgment and of the district court's order setting the matter for hearing be served on the attorney who had filed the response on petitioner's behalf in the court of appeals (*i.e.*, his present counsel) and on petitioner's counsel at his state trial; that copies also be mailed to petitioner at his last known address; and that a transcript of the ordered hearing be certified to it (App., *infra*).[3]

[3] We have been advised by the United States Attorney that on September 18, 1973 (subsequent to the filing of the certiorari petition), a hearing was held by the district court pursuant to the court of appeals' judgment. As appears from an order of the district court entered September 20, 1973, a copy of which has been supplied us by the United States Attorney and is being lodged herewith for the Court's information, petitioner's counsel appeared at the hearing, but not petitioner. The order indicates that the attorney gave no explanation at the hearing for the failure of petitioner to appear and that he was unaware of petitioner's whereabouts. Exhibits reflecting petitioner's state

1. Petitioner's contention that the challenged conditional orders are invalid because the constructive custody from which he fled was that of the State of Georgia, not the United States, and had to do with charges unrelated to those involved in his federal appeal (Pet. 4–5, 16–17) is answered in the opinion of the court of appeals (App., *infra*, p. 11), on which, as to this point, we principally rely. As the opinion notes, petitioner's escape from state custody, his subsequent state conviction, the revocation of his state bail bond, the fact that he remains at large despite the existence of the state bench warrant, and the fact that his response filed in the court of appeals contains no indication of his whereabouts nor any affirmative averment that he intends to submit himself to the jurisdiction of the court or of the State of Georgia constitute sufficient grounds for concluding that petitioner intends to abide by the court's judgment only if it is favorable to him. Granting that petitioner's probable principal reason for remaining at large is to avoid service of the 40-year state sentence, which he presumably now knows was imposed on him, it is evident that he could not surrender to start service of his federal sentence (should the court of appeals affirm it) without at the same time subjecting himself—then or eventually—to arrest under the outstanding state warrant.

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court conviction and sentence, the ensuing forfeiture of his state bond, and the issuance of the bench warrant for his arrest were introduced at the hearing by the government. The court concluded that, insufficient cause having been shown by petitioner or his counsel, there was no reason why the conditional orders of the court of appeals should not be made final, and it directed that the court of appeals be so advised.

2. There is no merit to petitioner's contention that the contested orders are invalid because the supporting factual representations were not sworn to (Pet. 3–4, 5, 13–15, 19). While it is true that petitioner did not acknowledge the truth of the representations, neither did he deny them. Nor did the response filed on his behalf by his attorney rely on the absence of a supporting affidavit. The representations related to matters of public record—the proceedings of a state court—proof of which could readily have been supplied had it been specifically demanded.[4] At least in such circumstances, a court can properly rely on unsworn representations made to it in an important matter by a responsible public official.[5]

3. Also without substance is petitioner's claim that the court of appeals could not properly rule on the motion to revoke his appeal bond without first notifying him that the motion was under consideration (Pet. 4, 18–19). The record reflects that copies of the motion were served by mail by government counsel both on

[4] As noted in footnote 3, *supra*, copies of the pertinent state court records were in fact introduced by the government at the September 18, 1973, hearing in the district court.

[5] There is no substance to petitioner's suggestion that the government's representation that he "'escaped' from custody" was inconsistent with its assertion that his state bond was thereupon forfeited—and that the allegations were consequently unreliable (Pet. 17–18). Petitioner's claim is that he "would not * * * [have been] on bond if he was in custody." However, government counsel did not say that petitioner had escaped "from custody," but that he had escaped "from the Fulton County Courthouse" (R. 2, 5, 7). Read in context with what followed, the statement's evident meaning was that petitioner had fled from the courthouse while free on bond—in other words, that he had "jumped" his state bail.

petitioner and on his court of appeals counsel (R. 8). Both presumably were aware, therefore, that the revocation motion was pending. The revocation motion, moreover, was based on the same facts as the dismissal motion—notice of which petitioner concedes he received (Pet. 9, 18)—and the relief sought by each was to all intents and purposes identical. There is thus in any event no basis for a claim of prejudice.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[6] The court of appeals properly placed on petitioner, contrary to a further suggestion of the petition (Pet. 4, 14–15), the burden of showing cause at the ordered hearing why its conditional orders should not be made final. Since the government, in its motions, had made a *prima facie* showing of grounds for the relief sought, the burden of overcoming the showing was properly petitioner's.

There is no conflict between the decision below and *Lannom* v. *United States*, 401 F. 2d 504 (C.A. 9), relied on by petitioner (Pet. 15). In that case the Ninth Circuit, without articulating a reason, denied a motion by the government to dismiss an appeal from a conviction, based on the ground that the appellant had jumped bail and was a fugitive. So far as appears, the court denied the requested relief as a discretionary matter—a conclusion suggested by the fact that it then proceeded to affirm the conviction. Since there is no indication that the court in *Lannom* deemed itself bound to consider the merits of the appeal notwithstanding the appellant's status as a fugitive, the decision is reconcilable with the court's holding in this case. The court held no more here than that an appellate court has "the power and authority" to dismiss an appeal in these circumstances (App., *infra*, p. 10)—an authority it determined in its discretion to exercise.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1776

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOHN PAUL SHELTON, DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Northern District of Georgia

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(AUGUST 2, 1973)

BEFORE BELL, GODBOLD AND INGRAHAM, CIRCUIT JUDGES.

BY THE COURT: Shelton was convicted in federal district court of interstate transportation and concealment of a stolen motor vehicle, was sentenced to two concurrent five-year terms on February 2, 1973, and filed notice of appeal on March 5. The District Court granted Shelton release pending appeal on condition of $5,000 bond with surety.

On June 1 Shelton escaped from state custody during his trial on state charges of forgery.[1] He was found guilty on the forgery charges, his state bond was for-

[1] While the jury was deliberating.

feited and a bench warrant issued. He remains at large. On June 1, the same day that Shelton escaped, his pro se brief in the appeal from the federal conviction was filed in this court.

On June 18 the District Court held a show cause hearing in response to a motion by the U.S. Attorney to revoke or forfeit the appeal bond. Shelton did not appear at that hearing nor was he represented by counsel.[2] The District Court determined that it lacked jurisdiction to order forfeiture of the bond.[3]

The United States has now filed with this court a motion to revoke or forfeit Shelton's appeal bond and a motion to dismiss the appeal on the basis that Shelton has absconded and defied the authority of this court. An attorney, who did not represent Shelton in the trial of the federal charge or of the state charge, has filed a response to the government's motions contending that Shelton has neither breached the conditions of the federal bond nor evidenced any intent not to obey the judgment of this court.

An appellate court has the power and authority to dismiss the appeal of an appellant who has escaped from custody or jumped bail, the rationale being variously expressed as disentitlement of the appellant to call upon the resources of the court to consider his claim, as discretion of the court to refuse to consider the claim of a litigant who indicates that he will comply with the court's decree only if it is favorable, or as the lack of a justiciable controversy. *Molinaro* v.

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[2] The attorneys who represented Shelton in the state proceedings advised the District Court that they did not represent Shelton in his federal appeal.

[3] The conditions of the bond are that Shelton appear before this court, abide by and obey its orders, and surrender himself if his conviction is affirmed. There are no conditions limiting Shelton to remaining within any particular geographical area pending his appeal.

New Jersey, 396 U.S. 365, 24 L.Ed. 2d 586 (1970); *Eisler v. U.S.*, 338 U.S. 189, 93 L.Ed. 1897, *dism'd* 338 U.S. 883, 94 L.Ed. 542 (1949); *Smith v. U.S.*, 94 U.S. 97, 24 L.Ed. 32 (1876); *Johnson v. Laird,* 432 F.2d 77 (CA9, 1970); *U.S. v. O'Neal,* 453 F.2d 344 (CA10, 1972); *U.S. v. Dawson,* 350 F.2d 396 (CA6, 1965). In this instance the custody fled is that of another sovereign and upon a charge unrelated to that embraced in the federal appeal. We conclude, however, that the escape from state custody, the subsequent state conviction, the revocation of the state bond, the fact that Shelton remains at large despite the existence of the state bench warrant, and the fact that the response filed in this court contains no indication of his whereabouts nor any affirmative averments that he intends to submit himself to jurisdiction of this court or of the State of Georgia, constitute sufficient probable cause for this court to conclude that appellant will not comply with orders of this court and will abide its decree only if favorable to him. We therefore conditionally revoke his appeal bond and conditionally dismiss his appeal. The cause is remanded to the District Court which shall schedule a prompt hearing at which appellant shall appear in person (and with counsel, if he wishes) and show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final. Copies of this order and of the District Court's order setting the matter for hearing shall be served upon counsel who filed the response in this court, upon appellant's counsel in his state trial, and a copy of each mailed to appellant's last known address. A transcript of the District Court hearing shall be certified to this court

The motions of the United States are conditionally GRANTED and the CAUSE REMANDED to the District Court for further proceedings as hereinabove provided.

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